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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC. IN OPPOSITION

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OPINIONS BELOW

The court of appeals' opinion has not yet been officially reported. It appears as Appendix A to the Petition. (App. 1a-41a.)* The opinion and order of the Federal Communications Commission is officially reported at 31 F.C.C. 2d 708 (1971). It appears as Appendix C to the Petition. (App. 43a-55a.)

JURISDICTION

The court of appeals' judgment was entered on February 2, 1972. The petition for a writ of certiorari was

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* "App. —" citations are to the Appendix to the Petition for Writ of Certiorari.

filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed a ruling of the Federal Communications Commission declining to require licensees automatically to afford Petitioner time to respond to broadcast appearances of the President of the United States.

2. Whether Petitioner adequately raised below its allegations regarding the validity of the Federal Communications Commission's procedures for processing fairness doctrine complaints, and, if so, whether the court of appeals erred in upholding the reasonableness of those procedures.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

STATEMENT OF FACTS

This case arises from the continuing efforts of Petitioner Democratic National Committee ("DNC") to obtain an automatic right to time to respond to broadcast appearances of the President of the United States. Petitioner is also pressing its contention before the Federal Communications Commission (the "Commission") in two pending rulemaking proceedings.[1]

In this case, DNC seeks a right to reply to three television appearances of the President in March and April

[1] DNC has filed comments urging the Commission to adopt such a rule in *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, Docket No. 19260, 30 F.C.C.2d 26 (1971), and in *Obligations of Broadcast Licensees Under the Fairness Doctrine: Notice of Proposed Rule Making*, Docket No. 18859, 35 Fed. Reg. 7820 (1970).

1971. The first was a March 15, 1971 interview broadcast by the National Broadcasting Company, Inc. ("NBC") on the "Today Show"; the President was interviewed for approximately 48 minutes on a variety of topics, with the primary focus on his personal life. (App. 4a.) The second was on a one-hour program entitled "A Conversation With The President" broadcast by American Broadcasting Companies, Inc. ("ABC") on March 22, 1971; in the course of this broadcast an ABC newsman interviewed the President on a wide variety of issues, but primarily on the Administration's policies with respect to Southeast Asia. (App. 4a-5a.) The third appearance was a 20-minute Presidential address to the nation, on April 7, 1971, which was broadcast by the three major radio and television networks; the President discussed the Administration's programs and policies in Southeast Asia. (App. 5a.) This address was the only one of the President's appearances at issue which was broadcast by CBS. All of these broadcasts pre-dated the President's announcement that he would be a candidate for the Republican nomination in 1972.[2]

In a series of telegrams to the networks, DNC sought equal time to reply to each of the appearances. In response to DNC's request to respond to the President's April 7 speech, ABC determined that, on the basis of the network's overall coverage, it would be appropriate for it to give DNC one-half hour to discuss the war issue. Each of the networks denied DNC's request for time to reply to the other Presidential appearances.[3]

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[2] The President announced his candidacy on January 7, 1972. See *New York Times*, January 8, 1972, p. 1.

[3] App. 5a-6a. The Republican National Committee ("RNC") sought an opportunity to respond to DNC's half-hour broadcast on ABC. (App. 7a-11a.) Finding that ABC had complied with the fairness doctrine, the Commission denied RNC the relief requested. (App. 54a.) The court below affirmed. (App. 28a-33a.) RNC has not sought review in this Court.

DNC thereupon filed letters of complaint with the Commission against all three networks. (J. App. 1-41.) [4] DNC urged the Commission to expand the fairness doctrine—which generally requires that broadcasters present conflicting views on controversial issues of public importance—to afford Petitioner an automatic right to respond to Presidential broadcast appearances. DNC made no effort to establish that any of the networks had failed to comply with their traditional fairness doctrine obligations.

In response to the DNC complaint, CBS pointed out (J. App. 65-73; 126-29) that neither the fairness doctrine nor the Commission's decisions afforded DNC an automatic right to respond to the President. CBS also summarized the extensive coverage it had given to the views of those opposed to the Administration's Vietnam policies. (J. App. 68-70.) The summary demonstrated that Democratic Party leaders had been afforded significant opportunities to present views opposing those of the President.[5] CBS also pointed out that it had scheduled an appearance of the Chairman of DNC on FACE THE NATION the following week. (J. App. 70n.**.) ABC and NBC also stated that they had broadcast and would continue to broadcast contrasting views on the issues discussed in the Presidential appearances. (J. App. 46-50; 52-59.)

In its reply, while still making no effort to establish that the networks had failed to comply with the general fairness doctrine, DNC sought a formal evidentiary hear-

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[4] "J. App. ——" citations are to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[5] In addition, it should be noted that CBS has periodically provided time free of charge to Democratic Party spokesmen to discuss issues selected by them. See *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971).

ing to test the networks' fairness doctrine compliance. (J. App. 111-20.)

The Commission denied DNC's complaints. It held that the question, under long-standing fairness doctrine principles, was "whether on an overall basis the networks have afforded reasonable opportunity for the discussion of contrasting viewpoints." The Commission concluded that DNC had made no showing that any of the networks had failed to do so.[6] It declined to extend the fairness doctrine to afford DNC an automatic right to respond to the President, but noted that the general issues DNC sought to raise would be considered in the Commission's pending rulemaking proceeding.[7]

The court of appeals unanimously affirmed. It concluded that the Commission was not compelled by the First Amendment or the Communications Act to require broadcasters to afford Petitioner an automatic right of reply to Presidential broadcast appearances, and that the Commission's ruling was fully consistent with its prior holdings. (App. 14a-28a; 35a-37a.) Noting that, on review, DNC was asserting that the Commission improperly required it to make a *prima facie* showing of a fairness doctrine violation, the court pointed out that this issue had not been raised before the Commission and that DNC was therefore barred from raising it on review. Nevertheless, the court reaffirmed earlier decisions holding that the Commission's procedures were reasonable. (App. 37a-38a.) Finally, the court rejected DNC's claim of a right to an evidentiary hearing to test whether the networks had satisfied the requirements of the fairness doctrine. It found no statutory basis for such

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[6] App. 53a-54a. The Commission also denied DNC's request for an evidentiary hearing, because there was "no basis for further action on the specific programs involved." App. 54a.

[7] App. 54a-55a. Commissioner Johnson dissented without opinion.

a requirement and held that it would cause undue delay in the resolution of complaints. It concluded that existing Commission procedures, which had been employed in the *Red Lion* case,[8] were clearly reasonable and in the public interest. (App. 38a-40a.)

ARGUMENT

This case reflects DNC's continuing attempt to obtain substantial modification of long-standing fairness doctrine principles approved by Congress and consistently applied by the Commission, so as to obtain an automatic personal right to broadcast time to respond to Presidential appearances. DNC does not assert that the decision below conflicts with any decision of this Court or with any decision of any other circuit. Nor does it argue that the Commission has incorrectly applied the traditional principles of the Communications Act to this case. DNC's basic contention appears to be that its own proposals would better achieve the goals of the First Amendment and the Communications Act than those consistently followed up to the present time. The Commission and the court below properly rejected Petitioner's contention, and review by this Court is neither necessary nor appropriate.

1. Although it fails to identify any of the traditional tests for grant of certiorari, DNC does assert (Pet. 12) that certiorari should be granted because the Court will be reviewing, in the coming Term, the decision of the court of appeals in *Business Executives' Move for Vietnam Peace* v. *FCC*, —— U.S. App. D.C. ——, 450 F.2d 642 (1971), *cert. granted sub nom. Columbia Broadcasting System, Inc.* v. *Democratic National Committee*,

[8] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

405 U.S. 953 (1972) (Nos. 71-863—71-866) ("*BEM*").[9] DNC suggests (Pet. 12) that the Court's "examination of the First Amendment obligations imposed on broadcasters" in that case will "be aided" by concurrent consideration of this case. DNC concedes, however, that the issues in the two cases are "not identical." *Ibid.*

In fact, the *BEM* case is in no way similar to this case. As the court of appeals in *BEM* characterized it, that case concerns time for paid "spot" announcements and involves "the public's First Amendment interests in broadcasters' allocation of advertising time."[10] The court there held that a licensee that sells advertising time to commercial advertisers cannot refuse to sell time for short spot announcements on controversial issues of public importance. As for requests to purchase program time, the court stated that the "constellation of constitutional interests would be substantially different."[11]

At any rate, the *BEM* case did not involve requests for free time to discuss controversial issues of public importance. The panels in the *BEM* case and in this case both recognized that in that area the governing standard is fixed by the equal opportunities provisions of Section 315 of the Communications Act, 47 U.S.C. § 315, and the Commission's fairness doctrine. 450 F.2d at 654; App. 22a.

2. Petitioner does not and cannot contend that its claimed automatic right to respond to the President is required by the equal opportunities provisions of Section

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[9] While Petitioner (Pet. 11) characterizes these as "several cases," they are in fact several petitions for certiorari involving review of the same decision.

[10] 450 F.2d at 654. "Spot announcements" are the short time segments, typically one minute or less, sold by broadcasters to advertisers.

[11] *Ibid.* "Program time" is the time broadcasters generally devote to more lengthy presentations of entertainment, news, public affairs and other non-commercial material.

315 of the Communications Act. President Nixon was not an announced candidate for re-election at the time of the appearances in question.[12] Indeed, as the Commission recognized in this case, Petitioner is in effect requesting that the Commission undertake to amend Section 315 by extending an automatic "equal opportunities" right of reply to appearances of the President. That result would be utterly inconsistent with the Congressional scheme, in which Section 315 has been deliberately limited to certain election appearances of candidates for public office. (App. 51a.)

Nor does Petitioner contend that the decision below is inconsistent with the Commission's traditional interpretation of the fairness doctrine. In the court below DNC conceded that it would not be entitled to an automatic right of reply to Presidential appearances under the fairness doctrine, as sustained by this Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).[13] That is because the fairness doctrine requires only that opposing views be presented. It does not require that they be afforded "equal time" or that they be presented by particular spokesmen such as DNC.[14] Accordingly, while the Commission has ruled that the fairness doctrine applies

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[12] See *McCarthy* v. *FCC*, 129 U.S. App. D.C. 56, 390 F.2d 471 (1968). See also note 2, *supra*. If the President had been an announced candidate for the Republican nomination, and if he had appeared in a broadcast not exempt from the equal opportunities requirements of Section 315, the networks would have been required to afford equal opportunities only to opposing candidates for the Republican nomination. See, *e.g.*, *Kay* v. *FCC*, 143 U.S. App. D.C. 223, 443 F.2d 638 (1970).

[13] DNC Br. 19, 21-22.

[14] One of the general fairness doctrine's most basic precepts, stated in the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), is that no specific individual or group has the right to present opposing views, and that "the licensee must operate on a basis of overall fairness." 13 F.C.C. at 1250.

to Presidential statements on controversial issues, it has consistently required only that licensees provide a reasonable opportunity for the presentation of views contrasting with those of the President.[15]

3. Petitioner contends that the principles of the Commission's traditional fairness doctrine, while adequate as "abstract propositions" (Pet. 16), are constitutionally inadequate as applied to Presidential appearances. The Commission and the court of appeals properly rejected this contention.

The record before the Commission afforded no basis for concluding that the application of fairness doctrine principles to Presidential appearances has failed to produce fair presentation of views on controversial issues contrasting with those of the Administration. While the record shows that broadcasters, like other media, exhibit considerable interest in the President's activities—as an individual, national leader, and Administration spokesman—it flatly contradicts DNC's assertion (Pet. 13, 15) that, under the present system, "those opposing the President's views [are denied] any effective right to respond" and that "only the President's voice and views will be heard clearly on critical issues." See pp. 5-6, *supra*.[16]

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[15] See, *e.g.*, *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 294-96 (1970); *Letter to Blair Clark*, 11 F.C.C.2d 511, 515, *aff'd sub nom. McCarthy* v. *FCC*, 129 U.S. App. D.C. 56, 390 F.2d 471 (1968); *Letter to Republican National Committee*, 40 F.C.C. 625, 627 (1964). See also App. 50a, 53a-54a.

In one *sui generis* situation, *Committee for Fair Broadcasting*, *supra*, 25 F.C.C.2d at 297, the Commission has required broadcasters to afford an opportunity for the uninterrupted presentation of opposing views in answer to the President.

[16] It is particularly surprising that DNC focuses in this case on the supposed Presidential monopoly of opinion on the Indochina War issue. As the District of Columbia Circuit recently concluded in another case, it is hard to imagine "that any live American has

Moreover, DNC cannot appropriately claim that it should be afforded special rights to appear as the spokesman for those who disagree with the President's views. In broadcasting, characterized by a limited number of available frequencies, not all those wishing to present their particular views may be afforded time and in general no one individual or group can claim an automatic right to present contrasting views.[17] As the court below stated (App. 36a):

> "[DNC asserts] . . . that as the leading party out of the White House and as the majority party in Congress . . . [it] would always be an appropriate party to respond. DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task? At times the President speaks to crucial prob-

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been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam War," and "these issues have been ventilated *in extenso* for years on (probably) every television and radio station in the land." *Green* v. *FCC*, 144 U.S. App. D.C. 353, 359, 360, 447 F.2d 323, 329, 330 (1971).

Moreover, as the court of appeals in this case stated (App. 36a-37a):

> "Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking. We see no need for supplementation based on some theoretical right in the First Amendment which at best has gone undefined in this litigation."

[17] See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

lems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States."

4. Petitioner also asserts that the Commission's refusal to extend the fairness doctrine by according it an automatic right of reply is arbitrary and capricious because the Commission has adopted automatic right of reply requirements in the personal attack and political editorial rules, sustained by this Court in the *Red Lion* case, and in the so-called political party doctrine.[18] DNC does

[18] The personal attack rules require a licensee under certain circumstances to afford reply time to an identifiable person or group whenever, during the course of discussion of a controversial issue of public importance, the person or group has been the object of an attack dealing with "honesty, character, integrity, or like personal qualities." The political editorial rules require a licensee to afford time to a candidate for public office or his spokesman when the licensee has editorially endorsed opponents of a candidate or opposed him. See, *e.g.*, Section 73.679 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 73.679.

The so-called political party doctrine was announced in two Commission decisions, *Letter to Nicholas Zapple*, 23 F.C.C.2d 707, (1970), and *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. ——, 454 F.2d 1018 (1971). In *Zapple*, the Commission held that, when a broadcaster sells time to supporters of a candidate during an election period, it must sell comparable time to supporters of opposing candidates. In *Republican National Committee*, the Commission held that CBS was required to afford time to the Republican National Committee because it had afforded time to the Chairman of the Democratic National Committee to respond to a Presidential broadcast appearance. It is particularly ironic that DNC relies in this case upon the Commission's *Republican National Committee* ruling, since DNC, along with CBS, successfully challenged that decision on appeal. The court of appeals

not suggest, however, why the Commission's actions in adopting these fairness doctrine "corollaries" are inconsistent with its ruling in this case.[19] In any event, great weight should be accorded to the Commission's interpretation of its responsibilities in this area under the Communications Act and its judgment as to the proper policy for achieving the Act's objectives.[20] The Commission is not required by the Act to afford such reply opportunities in each and every situation, especially in the absence of any evidence that the traditional principles of the fairness doctrine are not adequate to ensure the presentation of contrasting views.

5. Before the Commission and the court of appeals, Petitioner contended that it was entitled to a formal evidentiary hearing to determine whether the networks had complied with the fairness doctrine in their handling of the Presidential appearances in question. The contention was rejected both by the Commission and the court below, and Petitioner does not urge this Court to review those rulings. Instead, Petitioner contends that the Com-

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reversed the Commission on the grounds that its decision was in direct conflict with an earlier Commission ruling and that it was otherwise arbitrary and irrational.

[19] Before the court of appeals, DNC argued that the Commission adopted these "corollaries" because of the "impact" of the original appearances. As was pointed out below, these rules have nothing to do with "impact." The personal attack rules and the political editorial rules trigger a right to respond regardless of the "impact" of the personal attack or of the political editorial. See *Red Lion*, *supra*, 395 U.S. at 378-79. The third "corollary"—the so-called "political party" doctrine—is equally unrelated to notions of "impact," either in its applications or in its origins. Under the *Zapple* ruling, *supra*, the right to purchase time is triggered merely by the first party's purchase regardless of the "impact" of its broadcast. Even under the Commission's now-reversed *Republican National Committee* ruling, *supra*, the "impact" of the political party's appearance was irrelevant.

[20] See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-82.

mission erroneously placed the burden on Petitioner to make a *prima facie* showing that the networks had violated the fairness doctrine and improperly refused to require the networks to provide documentation concerning their coverage of the issues discussed in the Presidential broadcasts. Neither of these contentions was properly raised by Petitioner before the Commission, and accordingly cannot properly constitute a ground for reversal.

The court of appeals specifically found (App. 37a-38a) that Petitioner had "failed to preserve" the burden of proof issue for review.[21] As to the second contention, concerning documentation, Petitioner made no request for documentation from the networks, did not raise the issue before the Commission, and barely adverted to it before the court of appeals.[22] Petitioner seeks to rest, however, on the fact that before the Commission the Republican National Committee ("RNC") sought documentation from ABC concerning its complaint that that network had violated the fairness doctrine by unduly favoring anti-Administration views. (Pet. 20n. 29.) Obviously, RNC's request for documentation is not sufficient to bring before this Court a contention which DNC failed to assert before the Commission.[23] In any event, the Commission's procedures for handling fairness doctrine

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[21] See Section 405 of the Communications Act of 1934, as amended , 47 U.S.C. § 405, which precludes judicial review where, as here, the petitioner fails to seek reconsideration of the Commission's action, and seeks to rely "on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

[22] DNC Br. 38-40.

[23] RNC sought documentary support solely from ABC and solely to demonstrate that, if that network's non-news programs (such as the "Dick Cavett Show") were taken into account, ABC had broadcast excessive amounts of anti-Administration views.

complaints in these respects are fully consistent with its past practice,[24] and have previously been sustained by the District of Columbia Circuit as reasonable.[25]

6. Finally, even if there were issues here meriting review by this Court—which we submit there are not—this case is not an appropriate vehicle for considering them. In current rulemaking proceedings the Commission has before it Petitioner's request that it be afforded an automatic right of reply to Presidential appearances. See note 1, *supra*. The Commission also has before it the very questions Petitioner seeks to raise regarding its procedures for processing fairness doctrine complaints.[26] If issues in this area are to be considered by this Court, they can and should be reviewed in the context of the Commission's action in those rulemaking proceedings and the record made therein.[27]

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[24] See, *e.g.*, *Robert G. Ryan*, 25 F.C.C.2d 884 (1970); *Allen C. Phelps*, 21 F.C.C.2d 12 (1969); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* (the *"Fairness Primer"*), 40 F.C.C. 598, 600 (1964).

[25] See, *e.g.*, *Hale* v. *FCC*, 138 U.S. App. D.C. 125, 127-28, 425 F.2d 556, 558-59 (1970). As the court below noted (App. 30a), quoting from the Commission's *Fairness Primer:*

> "'[I]t would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time.'"

[26] See, *e.g.*, Comments of the Office of Communication of the United Church of Christ, *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, Docket No. 19260, December 20, 1971.

[27] In the light of pending rulemaking proceedings, the Commission could reasonably refuse to consider Petitioner's proposals for

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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radical and far-reaching changes in an *ad hoc* request for declaratory ruling. See, *e.g.*, *Martin-Trigona* v. *FCC*, 139 U.S. App. D.C. 249, 432 F.2d 682 (1970); *Hale* v. *FCC*, *supra*.